STATE OF MICHIGAN

COURT OF APPEALS

LIBERTY BIDCO INVESTMENT CORPORATION,

Plaintiff-Appellant,

v

EMMET COATING SERVICES, INC., formerly known as EMMET-ENAMELCOTE COMPANY,

Defendant-Appellee.

UNPUBLISHED
January 13, 2005

No. 246681
Macomb Circuit Court
LC No. 2001-001354-ck

Before: Neff, P.J., and Cooper and R. S. Gribbs*, JJ.

PER CURIAM.

In this breach of contract action, plaintiff appeals as of right an order denying its motion for summary disposition and granting summary disposition to defendant pursuant to MCR 2.116(I)(2). We affirm.

On April 15, 1999, the parties entered into a loan assumption agreement in which it was agreed that defendant would assume a $288,239 debt to plaintiff incurred by a bankrupt industrial coating company (Enamelcote) whose assets had been purchased by defendant. Under the terms of the agreement, plaintiff was required to use commercially reasonable efforts to collect the loan from the remaining assets of Enamelcote or from the personal guarantors. Eight months after the agreement was signed, plaintiff hired a debt collection firm, which filed a lawsuit against one of Enamelcote's customers (PSI) that owed Enamelcote more than $320,000. However, Enamelcote had already filed suit on the same contract almost a year earlier, a fact known to plaintiff. Plaintiff's suit against PSI was dismissed pursuant to MCR 2.116(C)(6), and the dismissal was affirmed by this Court in *Liberty BIDCO v Talon Automotive d/b/a Production Stamping Inc*, unpublished opinion per curiam of the Court of Appeals issued July 9, 2002 (Docket No. 226609).

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

I

Plaintiff first argues that defendant failed to present sufficient evidence that plaintiff's actions were not commercially reasonable to permit summary disposition in favor of defendants. We disagree.

We review the grant or denial of a motion for summary disposition de novo. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001). The requirements for supporting a motion for summary disposition were explained in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996):

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

The threshold question is whether it was commercially reasonable for plaintiff to wait eight months from the execution of the loan assumption agreement to engage a debt collection agent. According to an expert employed by defendant, "A central component to the employment of commercially reasonable efforts to collect . . . is the timely engagement of counsel so that they can timely pursue accessible assets . . . . In this case, Plaintiff's continued attempts to collect by handling the litigations pro-se would not be reasonable." Although defendant's expert stopped short of stating that plaintiff's eight-month delay in engaging a debt collection firm was in itself commercially unreasonable, as defendant suggests, "accounts receivable do not get better with age." Plaintiff presented no evidence regarding why the delay was necessary, desirable, or should be excused; therefore, the trial court did not err in finding that plaintiff failed to proceed in a commercially reasonable manner.

Even if plaintiff's delay in beginning collection proceedings was alone not commercially unreasonable, plaintiff's action in filing a separate suit against PSI clearly was unreasonable, particularly in light of defendant's evidence that plaintiff knew that a separate lawsuit to collect the PSI accounts receivable was an improper means of collecting the debt.

The evidence offered at summary disposition by defendant demonstrated that plaintiff had failed to act in a commercially reasonable manner. Plaintiff's limited evidence failed to establish that its behavior was reasonable. In fact, the trial court's OPINION AND ORDER ruling on plaintiff's motion for reconsideration of the decision granting summary disposition to defendant concludes, "In the instant matter, plaintiff failed to proffer *any evidence* suggesting it engaged in commercially reasonable behavior despite being warned of the necessity to do so. Instead, the record clearly establishes plaintiff lost at least two collection opportunities due to its inaction. (Emphasis added.) Our close review of the record confirms the trial judge's conclusion and we likewise hold that plaintiff failed to establish a genuine issue of material fact as to the commercial reasonableness of its collection efforts.

Plaintiff also argues that a genuine issue of material fact was created by defendant's failure to show that plaintiff could have intervened in the *Enamelcote v PSI* lawsuit. This contention is without merit. MCR 2.209(A)(3) provides that on timely application a person has a right to intervene in an action:

> [w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In *Precision Pipe & Supply, Inc v Meram Constr Inc*, 195 Mich App 153, 155-157; 489 NW2d 166 (1992), this Court held that the appellant could intervene in the underlying suit pursuant to MCR 2.209 even though the litigation had proceeded for more than a year before the appellant filed its motion. This Court found that the motion to intervene was timely because it was filed only thirteen days after the appellant learned of the suit and because the defendant in the underlying litigation had failed to adequately protect the appellant's interests.

Although our Courts have not articulated a "bright line" rule defining when a motion to intervene is timely, as a general rule, the right to intervene should be asserted within a reasonable time. *American States Ins Co v Albin*, 118 Mich App 201, 209; 324 NW2d 574 (1982). Laches or unreasonable delay by the intervenor is a proper reason to deny intervention." *Id*. Moreover, MCL 2.209 should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented. *Precision Pipe, supra* at 156.

In the instant case, plaintiff's right to intervene accrued at the time the loan assumption agreement was signed – only two months after the complaint was filed in *Enamelcote v PSI*. Plaintiff clearly met the criteria under MCL 2.209 for intervention of right because plaintiff's intervention would have been timely. Moreover, plaintiff's interest clearly was not adequately represented in the *Enamelcote v PSI* lawsuit because the suit did not include a claim for the accounts receivable. On the basis of the evidence presented by the parties at summary disposition, the trial court properly granted summary disposition to defendant pursuant to MCR 2.116(I)(2).

II

Plaintiff next argues that defendant presented no evidence that plaintiff could have in fact recovered sufficient funds to offset defendant's entire obligation to plaintiff. We disagree.

Plaintiff's argument is inapposite. The lower court found that plaintiff had breached its obligation to collect its debt from the existing accounts receivable and from the original guarantors in a commercially reasonable manner before defendant's obligation to make payments had ripened. Because of this prior material breach, defendant had the option of canceling its performance. See *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994).

Plaintiff's eight month delay in engaging a debt collection firm, and its failure to proceed against Enamelcote's customers and the original guarantors in a commercially reasonable manner relieved defendant of its obligation to make payments under the loan assumption agreement. Furthermore, plaintiff's failure to proceed in a commercially reasonable manner in collecting its debt from PSI and the original guarantors had a material adverse effect on the obligations of the defendant who was effectively functioning as a guarantor for Enamelcote, the original debtor. See *In re Allied Supermarkets Inc*, 951 F2d 718, 728 (CA 6, 1991). Thus, defendant was relieved from its obligation to pay and was not required to prove set off. Plaintiff's remaining arguments are unpreserved and unsupported by relevant authority, and, regardless, are without merit.

Affirmed.

/s/ Janet T. Neff
/s/ Jessica R. Cooper
/s/ Roman S. Gribbs